Supreme Court, U.S.
FILED

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No. ___ OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

EDWARD DUFFY,

Petitioner,

vs.

THE DISTRICT BOARD OF TRUSTEES OF MIAMI-DADE COMMUNITY COLLEGE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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52 pp

QUESTIONS PRESENTED

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WHETHER A NEW ACADEMIC INSTITUTION, WITH NO HISTORY OF DISCRIMINATION, MAY COMMENCE AND MAINTAIN AN AFFIRMATIVE ACTION PLAN?

II

WHETHER SUMMARY JUDGMENT SHOULD BE GRANTED IN CASES INVOLVING MOTIVE AND INTENT?

III

WHETHER AN EMPLOYER MAY USE SHIFTING REASONS IN ARTICULATING A LEGITIMATE NONDISCRIMINATORY REASON FOR ITS ACTIONS?

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476 U.S. 267 (1986) 13,14

OPINION BELOW

The unpublished *per curiam* order of the United States Court of Appeals for the Eleventh Circuit affirmed the summary judgment granted by the District Court to the Respondent, the District Board of Trustees of Miami-Dade Community College, and against the Petitioner, Edward Duffy. The order is reproduced in the Appendix (App.) at page 1. The summary judgment granted by the District Court is reproduced at App. 2-9.

JURISDICTION

The judgment sought to be reviewed was entered on May 3, 1994 (App.1). By its order of July 19, 1994, this Court granted Mr. Duffy's application for extension of time within which to file Petition for Writ of Certiorari to September 23, 1994. Jurisdiction is conferred upon this Court by 28 U.S.C. 1254 (1).

STATUTORY PROVISION INVOLVED

42 U.S.C. 2000e - 2:

"Employer practices

(a) It shall be an unlawful employment practice for an employer --

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin...."

STATEMENT OF THE CASE

A. Procedural History

The Petitioner sued the Respondent alleging employment discrimination (R;19-1-4). The Petitioner alleged that he applied for the position of Associate Dean for Academic Support for the Wolfson campus of the Respondent in 1989, that the Associate Dean runs the Division of Academic Support, that he was not selected because he is black, and that the Respondent selected a white Cuban for the position because he is white, Cuban and Latin (R;19-2).

The Respondent answered (R;20-1-3) and filed a motion for summary judgment (R;32-1-14).

The District Court entered summary judgment in favor of the Respondent (App.2-9). The District Court found that the Petitioner had made a *prima facie* case, that the Respondent had articulated legitimate non-discriminatory reasons for not selecting the Petitioner for

the position, and that the Petitioner had failed to establish that the proffered reasons were pretextual. The District Court also found that the Petitioner's challenge to the Respondent's Affirmative Action Plan was characteristic of a new claim or law suit and therefore was misplaced.

B. Facts

In the Respondent's response to the Petitioner's EEOC charge (R;22-29) it gave two reasons why the Petitioner was not selected for the position.

The first reason was that the Petitioner had done poorly in the interview (R;75-25-26). The Respondent stated that: "Charging party apparently failed badly at the interview stage, the one opportunity to demonstrate to the committee that he was a viable candidate." (R;75-26). That statement demonstrably is false. The chairman of the selection committee, which interviewed the Petitioner, stated that the Petitioner did "well" (R;75-100); one committee member said that the Petitioner: "...did a good

job in the interview." (R;75-87); another committee member said the Petitioner did: "Fine" (R;75-76); another committee member said the Petitioner: "...was okay, he was okay" (R;75-94); one committee member said that the Petitioner did: "...very well on his background (sic)" (R;75-81-82).

The second reason given by the Respondent was that the Petitioner was a poor manager (R;75-26-27). That also is demonstrably false. The affidavit of the Petitioner's colleague, Venice Langlois, who worked with the Petitioner for five years on a daily basis, clearly established that the Petitioner was a most able administrator when he was Coordinator of Academic Advisement and Counseling (R;75-37-39). The Respondent's evaluations of the Plaintiff while he was Coordinator of Academic Advisement are even more significant. They were glowing (R;75-44-45;46;48;49-53;54-56;57-58;61-62). The Petitioner always received the

highest rating, competent (R;75-42;75-44;75-46;75-47;75-54;75-57;75-59).

The Respondent recognized that the reasons it gave the EEOC were untenable. In its motion for summary judgement it argued, instead, that the Petitioner was not chosen because Armando Ferrer, the person chosen, was more qualified. However, in its response to Petitioner's EEOC charge, the Respondent made a frank admission:

> "Charging Party asserts...that he is more qualified than the individual finally selected for the position. This self analysis at the paper screening level may be true based upon years with the Employer; however years of experience alone do not constitute quality or qualifications...." (R;75-26)

Additionally, the Petitioner submitted his affidavit, based upon his personal knowledge, setting forth quite clearly that he was more qualified for the position than Mr. Ferrer (R;75-30-36). The affidavit of the Petitioner's colleague, Venice Langlois, who worked with Mr. Ferrer

for four years on a daily basis, based upon her personal knowledge, also set forth quite clearly that the Petitioner was more qualified than Mr. Ferrer (R;75-37-39).

Moreover, Chuck Klingensmith, who held the position of Associate Dean for Academic Support in the mid 1980s, told the Petitioner that he was better qualified for the position than Mr. Ferrer (R;75-35,¶22). When Mr. Klingensmith held the position, he saw the Petitioner every day (R;75-65). He was the Petitioner's superior. The Petitioner's experience as Coordinator of Academic Advisement was good preparation for the position the Petitioner sought (R.-75-65-66). As to the duties that were the same when Mr. Klingensmith held the position, the best type of educational background is a degree in counseling or testing (R;75-72-73). The Petitioner has such a degree, Mr. Ferrer does not (R;75-30,¶3;34,¶15). The best professional experience is in counseling, advisement, or professional testing (R;72-73). The

Petitioner has such experience, Mr. Ferrer does not (R;75-31-32,¶7;34-35,¶s 16,17,18,19,20).

The Petitioner had experience in most of the new duties of the Associate Dean (R;75-31-34,¶s 5,13). Mr. Ferrer had no experience in the Division of Academic Support (R;75-34,¶16).

Eighty percent of the duties of the Associate Dean of Academic Support involved the duties of the Petitioner as Coordinator of Academic Advisement (R;75-33,¶11), which is under the Associate Dean.

The Respondent appointed the Petitioner Acting Associate Dean for Academic Support several times when he was Coordinator of Academic Advisement (R;75-33,¶8). The Petitioner trained two Associate Deans for Academic Support while he was Coordinator of Academic Advisement (R;75-33,¶9).

Dr. Eduardo Padron, the President of the Respondent's Wolfson campus, testified at his deposition

that the Wolfson campus has an Affirmative Action Plan. He has been President for twelve years (R;75-109). He is responsible for overseeing the Plan (R;75-109). The plan started the day the Wolfson campus opened (R;75-103).

There was no history of discrimination at the Wolfson campus. The Plan clearly is predicated upon perceived general societal discrimination:

> "Q. Has there been a history of discrimination against any particular group at the time that the Wolfson campus adopted the Affirmative Action Plan?
>
> * * * * *
>
> THE WITNESS: Well, not here, because we did not exist, but we felt, in view of the reality of what the world was at the time, that we needed to create an atmosphere that was totally different from what was present in most other situations." (R;75-103)

The Affirmative Action Plan, which applies to all areas of employment at the Wolfson campus, plainly extends preferential treatment to Latins.

Dr. Padron testified that they wanted to be representative of the community that they serve (R;75-105). They wanted to be representative of the students and population that they served by having a staff that is representative of them (R;75-105). The "mission" is to have a campus and staff that is representative of the students and community they serve (R:75-108). The mission and goals have remained the same throughout (R;75-109).

The Board of Trustees has established the goal that 50% of new hirings should be minorities (R;75-106). Minorities are Hispanics, Blacks, Females and any groups that are a significant percentage of the population in the area, Dade County, Florida (R;75-106-107). That includes faculties, admissions, all categories and positions, including President (R;75-107;110). They are trying to reach a point where they become representative and that is going to take time (R;75-110).

He knows the percentages of Latins and blacks in the population of Dade County, Florida during the years that he has been President (R;75-112). He uses the Census (R;75-112). At the last Census, the Latin population of Dade County was approximately 53% and the black population of Dade County was approximately 19% (R;75-112). During the 1980s he used whatever updates he received from the Department of Census (R;75-112). During the 1980s, the percentages were basically the same, with Latins increasing faster (R;75-112-113).

About 71% of the student population at Wolfson is Latin and about 12% is black (R;75-114). It was approximately the same in 1989 (R;75-114).

The Wolfson campus keeps statistics on the racial, ethnic, and gender breakdowns of the staff members, administrators, etc. (R;75-111). He gets that report often, because it is his concern (R;75-111).

In November, 1989, there were 46 administrators at the Wolfson campus (R;92-4). 45.6% were Latin (R;92-4). 13% were black (R;92-4).

In the Respondent's EEOC response, it stated that:

> "Respondent Employer strongly believes, under the leadership of our President, that the institution should mirror the population we serve...." (R;75-29)

Plainly put, at the Wolfson campus Latins are favored over blacks, in order to be representative of the student body, which is 71% Latin and 12% black, and the Dade County community, which is 53% Latin and 19% black. The result is an administrative staff which is 45.6% Latin and 13% Black.

REASONS FOR GRANTING THE WRIT

I

THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT IMPLICITLY HAS DECIDED A FUNDAMENTAL FEDERAL QUESTION -- -- WHETHER A NEW ACADEMIC INSTITUTION, WITH NO HISTORY OF DISCRIMINATION, MAY COMMENCE AND MAINTAIN AN AFFIRMATIVE ACTION PLAN -- WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT, AND HAS DECIDED IT IN A WAY WHICH CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

In *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), the affirmative action plan in question tied the layoff of minority teachers to the percentage of minority students enrolled in the school district. The lower court upheld the scheme, upon the theory that minority students were in need of role models to alleviate the effects of prior discrimination in society. This Court reversed. Justice Powell, writing for a four member plurality, drew

a distinction between "societal discrimination", which is an inadequate basis for race-conscience classifications, and the type of identified discrimination that can support and define the scope of race-based relief. The plurality reiterated the view expressed by Justice Powell in his concurring opinion in *University of California Regents v. Bakke*, 438 U.S. 265 (1978), that: "[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy." *Wygant v. Jackson Board of Education*, 476 U.S. at 276 (plurality opinion).

In *City of Richmond v. J.A. Crosson Co.*, 488 U.S. 469 (1989), a majority of this Court reached the same conclusion. The City of Richmond had adopted an affirmative action plan that required prime contractors to whom the city awarded construction contracts to subcontract at least 30% of the dollar amount of the contract to one or more Minority Business Enterprises (MBEs). "Minority group members" were defined as

"citizens of the United States who are Blacks, Spanish Speaking, Orientals, Indians, Eskimos, or Aleuts." 488 U.S. at 478. The Richmond City Council heard only generalized evidence concerning discrimination in the construction industry. "There was no direct evidence of race discrimination on the part of the city in letting contracts or any evidence that the city's prime contractors had discriminated against minority-owned subcontractors." 488 U.S. at 480. This Court disallowed the affirmative action plan:

> "We think it clear that the factual predicate offered in support of the Richmond Plan suffers from the same two defects identified as fatal in *Wygant*...Like the 'role model' theory employed in *Wygant*, a generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy. It 'has no logical stopping point.'...'Relief' for such an ill-defined wrong could extend until the percentage of public contracts awarded to MBEs in Richmond mirrored the

percentage of minorities in the population as a whole.

* * * * *

While there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota in the awarding of public contracts in Richmond, Virginia. Like the claim that racial discrimination in primary and secondary schooling justifies a rigid racial preference in medical school admissions, an amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota.

It is sheer speculation how many minority firms there would be in Richmond absent past societal discrimination, just as it was sheer speculation how many minority medical students would have been admitted to the medical school at Davis absent past discrimination in educational opportunities. Defining these sorts of injuries as 'identified discrimination' would give local governments license to create a patchwork of racial preferences based on statistical generalizations about any particular field of endeavor.

> These defects are readily apparent in this case. The 30% quota cannot in any realistic sense be tied to any injury suffered by anyone...." (448 U.S. at 498-499)

Here, there was absolutely no history of discrimination against any group at the Wolfson campus of the Respondent (R;75-104). The Affirmative Action Plan clearly is predicated upon perceived general societal discrimination (R;75-103). The Plan started the day the Wolfson campus opened (R;75-103). Latins are favored over blacks, in order to mirror the student body, which is 71% Latin and 12% black, and the population of Dade County, Florida, which is 53% Latin and 19% black. The result is an administrative staff which is 45.6% Latin and 13% black. This is like the plan condemned in *Crosson*, except that at least in *Crosson* there was *some* evidence of past discrimination in the relevant area. In rejecting the plan, *Crosson* noted that : "...'Relief' for such an ill-defined wrong could extend until the percentage of public

contracts awarded to MBEs in Richmond mirrored the percentage of minorities in the population as a whole." 488 U.S. at 498. That is precisely the Affirmative Action Plan's goal at the Wolfson campus.

This Court must decide this very important Federal question.

II

THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT IMPLICITLY HAS DECIDED AN IMPORTANT FEDERAL QUESTION -- WHETHER SUMMARY JUDGMENT SHOULD BE GRANTED IN CASES INVOLVING MOTIVE AND INTENT --- IN A WAY WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT, AND HAS DECIDED IT IN A WAY WHICH CONFLICTS WITH AN APPLICABLE DECISION OF THIS COURT AND OF OTHER CIRCUIT COURTS OF APPEALS.

This Court has recognized that an employer's true motivations are particularly difficult to ascertain in

discrimination cases. *United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983).

Recognizing this difficulty, the Circuit Courts of Appeals have held that summary judgment is improper in employment discrimination cases, as it is in other cases involving questions of motivation and intent: "In general, summary judgment is an inappropriate tool for resolving claims of employment discrimination, which involve nebulous questions of motivation and intent...." *Thornbrough v. Columbus and Greenville Rail Road Company*, 760 F.2d 633, 640 (5th Cir. 1985). "Often motivation and intent can only be proved through circumstantial evidence; determinations regarding motivation and intent depend on complicated inferences from the evidence and are therefore peculiarly within the province of the factfinder...." *Id.*, at 641; *Miller v. FDIC*, 906 F.2d 972, 974 (4th Cir. 1990) ("general rule that summary judgment is seldom appropriate in cases wherein

particular states of mind are decisive elements of a claim or defense."); *Wilson v. Seiter*, 893 F.2d 861, 866 (6th Cir. 1990) ("We are aware that state of mind is typically not a proper issue for resolution on summary judgment."), *vacated on other grounds*, ____ U.S. ____, 111 S.Ct. 2321 (1991); *National Union Fire Insurance Co. v. Turtur*, 892 F.2d 199, 205 (2d Cir. 1989) (Questions of intent, we note, are usually inappropriate for disposition on summary judgment.").

This is so because:

> "...it is particularly difficult for the nonmoving party to challenge the 'self-serving testimony' of the moving party without the benefit of trial accessories, namely cross-examination. *See 60 Ivy Street Corp. v. Alexander*, 822 F.2d 1432 (6th Cir. 1987) (Observing that 'the likelihood of self-serving testimony and the necessity for the fact-finder's credibility determinations' make summary judgment inappropriate when state of mind is at issue). Only through *live* cross-examination can the fact-finder observe the demeanor of a witness, and assess his credibility. A cold transcript of a deposition is generally no substitute because

it cannot unmask the veracity of a testifying witness clad in a costume of deception; it cannot unveil that a seemingly well-groomed witness is coming apart at the seams: 'that he fidgets when answering critical questions, his eyes shift from the floor to the ceiling, and he manifests all other indicia traditionally attributed to perjurers.' *Anderson*, 106 S.Ct. at 2521 (Rehnquist, J., joined by Burgur, C.J., dissenting)." (*International Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d 1257, 1265-1266 (5th Cir. 1991)

This Court must resolve this very important Federal question.

III

THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, BY AFFIRMING THE SUMMARY JUDGMENT ENTERED BY THE DISTRICT COURT, IMPLICITLY HAS DECIDED AN IMPORTANT FEDERAL QUESTION -- WHETHER AN EMPLOYER MAY USE SHIFTING REASONS IN ARTICULATING A LEGITIMATE, NONDISCRIMINATORY REASON FOR ITS ACTIONS -- WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT, AND BY AFFIRMING THE SUMMARY JUDGMENT, DESPITE THE EXISTENCE OF GENUINE ISSUES OF MATERIAL

FACTS, HAS SO FAR SANCTIONED THE LOWER COURT'S DEPARTURE FROM THE ACCEPTABLE AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER.

Summary judgment is proper only when the moving party demonstrates that there is "no genuine issue of material fact," *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986), and that it is entitled to judgment in its favor as a matter of law. A nonmoving party must then direct the court's attention to evidence in the record which demonstrates that it can satisfy a "fair-minded jury" that it is entitled to a favorable verdict. *Anderson*, 477 U.S. at 252. Only if, after the introduction of the non-movant's evidence, the total body of evidence presented by the two sides relevant to the material fact is still such that a movant would be entitled to a directed verdict at trial, *i.e.*, is such that no reasonable jury could find for the non-

movant, should the movant be granted summary judgment. *Anderson*, 477 U.S. at 249-250.

In deciding the motion: "...the evidence of the non-movant *is to be believed*, and all justifiable inferences are to be drawn in his favor...." *Anderson*, 477 U.S. at 255 (Emphasis Added). If a reasonable jury drawing all inferences in favor of the non-moving party could arrive at a verdict in favor of that party, the Court must deny the motion. *Ibid.*

In a Title VII case, after an employer has articulated a legitimate, nondiscriminatory reason for its actions, the plaintiff:

> "...now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. The burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered

explanation is unworthy of credence...." (*Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981))

The Petitioner has shown that the Respondent's EEOC response gave two reasons for its action and that both reasons were false. In its motion for summary judgment the Respondent changed its reason and stated that it chose Mr. Ferrer over the Petitioner because Mr. Ferrer was more qualified. The Petitioner submitted evidence contrary to that assertion. That evidence of the Petitioner, the non-movant: "...*is to be believed*, and all justifiable inferences are to be drawn in his favor...." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). That evidence, which is to believed, must result in a fact-finder concluding that the Respondent's proffered reason was a pretext. Summary judgment should have been denied.

The Respondent's failure to present a consistent explanation for its decision provides more than ample

basis to find pretext and to conclude that, but for the Petitioner's race, he would have been chosen. In *McLean Trucking Co. v. N.L.R.B.*, 719 F.2d 1226, 1231 (4th Cir. 1983), the Court held that:

> "...an employer's recitation of different justifications to support a discharge at different points in time can, in certain circumstances, constitute 'an affirmative and persuasive reason' for concluding that the asserted justifications never truly figured into the employer's actual decision to discharge the employee."

The shifting reasons asserted by the Respondent are merely *post hoc* rationalizations offered "...to clothe a discriminatory discharge in legitimacy." *Id.* An employer's "...inability to settle upon a coherent declaration of its motive...is evidence from which a fact-finder might infer that a discriminatory motive probably prevailed in the employer's mind." *Id.* "Unable to offer a consistent and coherent 'good motive', the employer cannot complain if

its vacillating defenses are rejected as inherently suspect." *Id.*

This Court must decide this important Federal question. Moreover, the decision below has so far departed from the acceptable and usual course of judicial proceedings that this Court must exercise its supervisory power.

CONCLUSION

The Petitioner prays that this Court grant its Writ of Certiorari.

Respectfully submitted,

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By: LOUIS M. JEPEWAY, JR.
Louis M. Jepeway, Jr.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **Petition for Writ of Certiorari** was mailed to **PHILIP D. PARRISH, ESQ.**, Stephens, Lynn, Klein & McNicholas, P.A., Suite 1500, 9100 S. Dadeland Boulevard, Miami, Florida 33156 this 23rd day of September, 1994.

By: LOUIS M. JEPEWAY, JR.
Louis M. Jepeway, Jr.

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

EDWARD DUFFY,

Petitioner,

vs.

THE DISTRICT BOARD OF TRUSTEES OF MIAMI-DADE COMMUNITY COLLEGE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPENDIX

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 92-4862

D.C. Docket No. 90-1875-Civ-EBD

EDWARD DUFFY,

Plaintiff-Appellant,

versus

THE DISTRICT BOARD OF TRUSTEES QF
MIAMI-DADE COMMUNITY COLLEGE,

Defendant-Appellee.

Appeal from the United States District Court
For the Southern District of Florida

(May 3, 1994)

Before HATCHETT and EDMONDSON, Circuit Judges, and MELTON , Senior District Judge.

PER CURIAM:

Affirmed. See Eleventh Circuit Rule 36-1.

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*Hon. Howell W. Melton, Senior U.S. District Judge for the Middle District of Florida, sitting by designation.

UNITED STATES DISTRICT
COURT SOUTHERN DISTRICT
OF FLORIDA

CASE NO. 90-1875-CIV-DAVIS

EDWARD DUFFY,

Plaintiff,

v.

ORDER ON MOTION FOR
FOR SUMMARY JUDGMENT

THE DISTRICT BOARD
OF TRUSTEES OF MIAMI-
DADE COMMUNITY COLLEGE,

Defendant.
_____/

THIS MATTER is before the court on Defendant's, The District Board of Trustees of Miami-Dade Community College ("Trustees"), motion for summary judgment[1] on this Title VII action. The

---

[1] A party seeking summary judgment bears the burden of demonstrating that there exists no genuine dispute as to any material fact, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986); Mercantile Bank & Trust Co. v. Fidelity & Deposit Co., 750 F.2d 838, 841 (11th Cir. 1985), or "that there is an absence of evidence to

Trustees contend that summary judgment is appropriate because evidence on the record fails to establish a prima facie case of discrimination against the Plaintiff Edward Duffy ("Duffy"). Furthermore, the Trustees argue that even if Duffy has established a prima facie case, there is no evidence on the record to support a finding that the articulated reasons for not promoting Duffy were pretextual.

For the reasons set forth below, the court finds that summary judgment is appropriate. Although Duffy has adduced evidence on the record to support a prima facie

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support the nonmoving party's case" in an action where it bears the burden of proof. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). All reasonable doubts as to the facts are to be resolved in favor of the party opposing summary judgment. Mercantile Bank & Trust Co., 750 F.2d at 841. While the burden on a party seeking summary judgment is great, the opposing party has a duty to present affirmative evidence in order to defeat a properly supported motion for summary judgment. Anderson, 477 U.S. at 250.

case, the record is devoid of evidence to carry Duffy's burden of establishing that the reasons proffered by the Trustees for not promoting Duffy are pretextual.

I. FACTS

In 1989, Duffy, a black associate professor at Miami-Dade Community College, applied for a position at the Wolfson campus as Associate Dean of Student Services. Approximately fifty other persons applied. A screening committee, composed of two Hispanic females, one Hispanic male, two black females and two white males, representing faculty, administrative and clerical positions on campus, reviewed all of the applicants written applications. The screening committee selected twelve semi-finalists, one of whom was Duffy. The semi-finalists were individually interviewed by the screening committee. Each committee member then voted for five out of the twelve individuals believed to be best qualified for the position. Duffy did not make the final five. The five

finalists included two white males, two black males and one Hispanic male. The dean of students, a black female, interviewed the remaining five finalists and recommended that Armando Ferrer, the Hispanic male, fill the position. The president of the Wolfson campus of Miami-Dade Community College accepted the Dean's recommendation.

II. DISCUSSION

A. ESTABLISHING A PRIMA FACIE CASE.

A prima facie case of racial discrimination can be made in several ways, including: [1] direct evidence of discriminatory intent; and [2] circumstantial evidence of discriminatory intent, proving all prongs of the test established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Weaver v. Casa Gallardo, Inc., 972 F.2d 1515, 1520 (11th Cir. 1991).

The Trustees contend that summary judgment is appropriate because the record contains no direct evidence of discriminatory intent. They argue that Duffy

admitted this in his deposition taken on April 29, 1991. The court agrees that the exhibits, affidavits, and depositions on the record do not contain evidence of overt discrimination. The court finds that there is an absence of direct evidence to support a prima facie case of discrimination.[2]

The Trustees also argue that summary judgment is appropriate because Duffy has failed to adduce facts that may be used as circumstantial evidence under the

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[2] Duffy contends that the college's affirmative action plan is unconstitutional and is direct evidence of discrimination in that it extends preferential treatment to Latins to the detriment of blacks. The court believes that this argument has all the characteristics of a new claim or lawsuit, and therefore is misplaced. The court construes Duffy's assertions related to the constitutionality of the affirmative action plan as an attempt to amend the complaint on the eve of trial. To allow Duffy to amend the complaint at this procedural juncture would prejudice Miami-Dade by unreasonably protracting the litigation. The court declines to do so. Nolan v. Douglas Co., 903 F.2d 1546, 1551 (11th Cir. 1990).

elements of the McDonnell Douglas test. Under this test, a plaintiff may establish a prima facie case of intentional discriminatory treatment by showing by a preponderance of the evidence that : [1] he belongs to a protected group; [2] he applied and was qualified for the promotion; [3] he was rejected; and [4] an applicant with equal or lesser qualifications who was not a member of the protected minority was selected. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981); Perryman v. Johnson Products, Inc., 698 F.2d 1138, 1142 n.7 (11th Cir. 1983) (citations omitted).

Clearly, Duffy can show that as a black male and member of a protected group, he applied for the position of Associate Dean and was rejected. The Parties agree that Duffy's selection as a semi-finalist shows his basic qualification for the position. Similarly, as a fellow semi-finalist, Ferrer, the non-black candidate selected for the position, had qualifications at least equal to those of

Duffy. Where there is evidence on the record to support a prima facie case under the McDonnell Douglas factors, the court finds that summary judgment on this ground is not warranted.

B. ESTABLISHING INTENTIONAL RACIAL DISCRIMINATION

Once a Title VII Plaintiff has established a prima facie case of racial discrimination, the burden shifts to the defendant to rebut the presumption through producing sufficient evidence articulating legitimate, nondiscriminatory reasons for its action against the plaintiff. Weaver, 922 F.2d 1521. Once the defendant has rebutted the plaintiff's prima facie case, the plaintiff must demonstrate by a preponderance of the evidence that he was the victim of intentional racial discrimination, "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is

unworthy of credence." Id. at 1522 (citing Burdine, 450 U.S. at 256).

Therefore, summary judgment is appropriate if the court finds that : [1] the Trustees have adduced undisputed facts articulating legitimate, non-discriminatory reasons for failing to promote Duffy; and [2] Duffy fails to adduce facts to establish that the proffered reasons are a pretext in that they are unworthy of credence or that a discriminatory reason more likely motivated Miami-Dade. See Wall v. Trust Co. of Georgia, 946 F.2d 805, 809 (11th Cir. 1991).

1. Trustees Proffer of Non-Discriminatory Reasons

In essence, the Trustees argue that Duffy was not promoted because the procedures used in the selection process,[3] including the application of objective and

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[3] Duffy attempts to discredit the integrity of the selection process by alleging inconsistency in the voting procedures. He asserts that another individual on the selection committee, James

unbiased standards by screening committee members, resulted in his ultimate disqualification at the finalist level.[4] (Def.'s Mot. Summ. J. Ex. A, Def.'s Interrog.).

McDonald, voted for him as finalist. This vote would have given him a total of three votes, enough to place him in the finalist category. However, this allegation is supported only by hearsay contained in Duffy's deposition and is not supported by McDonald's own affidavit. McDonald states that he has no records that indicate who he voted for; but that he does recall that he voted for Armando Ferrer, who he thought was better qualified. Duffy's attempt to raise a genuine issue of material fact on this ground fails.

[4] Duffy contends that, in its response to Duffy's EEOC charge, Miami-Dade set forth two additional reasons for not promoting him. First, Miami-Dade observed that "[c]harging party apparently failed badly at the interview stage, the one opportunity to demonstrate to the committee that he was a viable candidate." Duffy contests this with deposition testimony from screening committee members that he did "well," "fine," "okay." The court believes that Miami-Dade's statement to the EEOC was conclusory in nature and was not intended to address the merits of Duffy's application. Obviously, Duffy failed at the interview stage to be selected as one of the five finalists. Miami-Dade's statement does not

Furthermore, the reason that Duffy failed to become a finalist was that he was not one of the top five people who possessed the qualifications that screening committee members deemed necessary for the position. These qualifications may be gleaned from the reasons given by the screening committee members as to why they voted for Ferrer.[5]

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address the reasons for that failure and therefore is not material to this action. Second, Miami-Dade indicated that, had Duffy been recommended by the screening committee as a finalist, it was doubtful that he would have been successful because he lacked managerial skills. This statement is pure conjecture on the part of Miami-Dade and has no nexus with events that actually took place. As such, it is not material to this action.

[5] Duffy again attempts to assert a genuine issue of material fact by alleging that he was more qualified that Ferrer. However, this allegation is supported only by conclusory statements contained in Duffy's affidavit and the affidavit of an individual who was not a member of the screening committee.

The Miami-Dade "Employment Opportunities" bulletin for the position of Associate Dean of Student Support, states that the position requires "five years of progressively responsible experience in higher education or in related areas." The court concludes from its review of screening committee members' deposition testimony that screening committee members believed it essential that any candidate that they recommended for the position be a person with progressively responsible administrative experience. Lucinda Woodson stated that Ferrer's professional background as Registrar, Dean of Students and his work on South Campus prepared him for the position. (Woodson Depo. at 26). Robert Stevens indicated that Ferrer's experience, relative to Duffy's, was broader and that perception of leadership ability was very important. (Stevens Depo. at 32). Carmen Borroso stated that she voted for Ferrer because, at that time, he was head of the Registration and Administration Department.

(Borroso Depo. at 13). Rene Garcia, the chair of the Committee stated that they were looking for "[s]omeone who would provide some leadership." (Garcia Depo. at 29). The court finds that the deposition testimony of screening committee members provides evidence of undisputed facts that articulate legitimate, non-discriminatory reasons for the actions of Miami-Dade's screening committee.

2. Proffered Reasons Pretextual

The Trustees contend that Duffy has failed to produce evidence to establish that the reasons proffered by Miami-Dade are a pretext for racial discrimination, The court agrees for the reasons set forth below.

Duffy asserts that Miami-Dade Community College extended preferential treatment to Hispanics to the detriment of blacks in all phases of employment on Wolfson campus. By affidavit, Duffy and Venice Langlois, an ex-employee at the Wolfson campus, state that they

each had observed a pattern and practice of preferential treatment extended to Latins to the detriment of blacks. However, these allegations are totally unsubstantiated. Both affidavits are devoid of any facts to support a pattern and practice of preferential treatment. Duffy also states in his affidavit that during the latter half of the 1980's sixty to seventy percent of the administrators at the Wolfson campus were Latin and approximately ten percent were black. This statement is used to dispute the deposition testimony of Eduardo Padron who sated that Latin administrators comprise approximately forty-nine percent and black administrators about thirty percent. However, once again, the record contains no evidence to support Duffy's allegation. The court finds that Duffy has failed to adduce facts to establish that the proffered reasons are pretextual in that Miami-Dade's action were likely motivated by a discriminatory reason.

Duffy also argues that the proffered reasons should be given little credence in that Ferrer was not as well qualified for the position as he. Duffy's affidavit lists each of Ferrer's previous positions and then states in a conclusory fashion that "this [work] was totally unrelated to the task and function of the Division of Academic Support." In addition to the fact that these conclusions are totally unsubstantiated, they are in direct contradiction to Duffy's deposition testimony that he did not know Ferrer's qualifications. The court finds that Duffy's statements are not tenable.

Duffy proffers the deposition on Chuck Klingensmith, an former associate dean of academic support, to support the argument that Duffy was better qualified for the position than Ferrer. Klingensmith stated, that in his opinion, the best professional backgrounds for the position would be those of counseling, advisement or professional testing. Duffy argues that

because he, and not Ferrer had this background, he was more qualified. The court believes that Klingensmith's opinion is limited both in scope and application. As an individual who held the contested position several years ago and was not part of the screening committee, the court finds that this testimony does not rise to a level sufficient to support Duffy's case.

After an independent review of the record and being otherwise fully advised, it is therefore

ORDERED AND ADJUDGED that the Defendant's motion for summary judgment is GRANTED. Defendant shall submit a form of final judgment within ten days of the date stamped on this order.

DONE AND ORDERED in Chambers, at Miami, Florida, this 17th day of August, 1992.

EDWARD B. DAVIS
United States District Judge

cc: Counsel of Record

Supreme Court, U.S.
FILED
OCT 25 1994
OFFICE OF THE CLERK

No. 94-567

In The

Supreme Court of the United States

October Term, 1994

EDWARD DUFFY,

Petitioner,

v.

THE DISTRICT BOARD OF TRUSTEES OF MIAMI-DADE COMMUNITY COLLEGE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent, THE DISTRICT BOARD OF TRUSTEES of MIAMI-DADE COMMUNITY COLLEGE, respectfully restates the questions presented as follows:

1. WHETHER THIS COURT SHOULD EXERCISE JURISDICTION OVER AN ISSUE WHICH THE DISTRICT COURT HELD WAS NOT RAISED TIMELY, AND WHICH WAS THEREFORE NOT CONSIDERED BY THE DISTRICT COURT, PARTICULARLY WHERE THE DISTRICT COURT'S SUMMARY FINAL JUDGMENT BASED UPON OTHER GROUNDS WAS AFFIRMED BY THE ELEVENTH CIRCUIT COURT WITHOUT OPINION.

2. WHETHER THIS COURT SHOULD EXERCISE JURISDICTION OVER AN UNPUBLISHED PER CURIAM AFFIRMANCE OF A SUMMARY JUDGMENT IN THIS TITLE VII ACTION.

3. WHETHER THIS COURT SHOULD EXERCISE JURISDICTION OVER AN UNPUBLISHED PER CURIAM AFFIRMANCE OF A SUMMARY JUDGMENT IN THIS TITLE VII ACTION.

PARTIES TO THE PROCEEDINGS BELOW

Plaintiff: Edward Duffy

Defendant: The District Board of Trustees of Miami-Dade Community College

SUPREME COURT RULE 29-1
STATEMENT OF INTERESTED PARTIES

Honorable Edward Davis
United States District Judge

Edward Duffy,
Plaintiff/Appellant

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The District Board of Trustees of
Miami-Dade Community College
Defendant/Appellee

American Insurance Group (Appellee Miami-Dade's Insurance Carrier)

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No. 94-567

In The

Supreme Court of the United States

October Term, 1994

EDWARD DUFFY,

Petitioner,

v.

THE DISTRICT BOARD OF TRUSTEES OF MIAMI-DADE COMMUNITY COLLEGE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Respondent THE DISTRICT BOARD OF TRUSTEES OF MIAMI-DADE COMMUNITY COLLEGE, prays that this Court deny the Petition for Writ of Certiorari filed by the Petitioner, EDWARD DUFFY.

STATEMENT OF THE CASE AND FACTS

The Statement of the Case and Facts presented by the Petitioner is misleading and largely irrelevant, and therefore the Respondent will provide the following statement of the case and facts.

The Plaintiff, Edward Duffy, a black male associate professor at Miami-Dade Community College filed this

Title VII action against the District Board of Trustees of Miami-Dade Community College (hereinafter Miami-Dade). The operative pleading is the three page amended complaint filed by Duffy in January of 1991. (R1-19). Duffy alleged in his amended complaint that after applying for the position of Associate Dean of Student Services for the Wolfson Campus of the College in 1989 he was not selected for the position because he is black. He also claimed that he was the best qualified person for the position.

After extensive discovery, Miami-Dade moved for summary judgment based upon the following undisputed facts:

In 1989, Miami-Dade sought applications for the position of associate dean of student services at the Wolfson Campus. Pursuant to Miami-Dade's established procedures, a screening committee was selected to review the 50 or so applicants that had been submitted for the position, and to interview the applicants. The members of the screening committee were selected pursuant to established procedures of the College.

The objective in selecting members of the Screening Committee was to obtain a group that was both race and gender diverse. The Screening Committee was comprised of a cross section of faculty, administrative and clerical positions on campus, including persons who would be working within the department in which the position was located, i.e. Student Services. (R1-59-8; 11-14). The vacancy announcement for the position was posted internally at the college, as well as in the *Miami Herald*, the *Miami Times* and *El Diario*. As a result of the advertising

of the vacancy, approximately fifty individuals applied for the position of Associate Dean of Academic Support. After the applications had been submitted, the Screening Committee met to discuss the procedures that would be utilized to narrow the field of applicants to a number that would be interviewed for the position. (R1-64-10-12; R1-60-13-15). After each applicant was "paper screened" to see if the applicant met the general qualifications set forth in the job description, the Screening Committee met again to determine what individuals would be interviewed for the position. In paper screening the applicants, the Screening Committee decided which applicants did not meet the specifications of the job description, which applicants fully met the specifications of the job description, and which applicants deserved further consideration based on experience and credentials. (R1-63-10).

The Screening Committee met again to determine what individuals would be interviewed, based on the above criteria. Of the approximately fifty initial applicants, twelve persons were selected to be interviewed for the position. These include the following individuals who are listed in alphabetical order: (1) Armando Corominas-white male, hispanic, (2) Benjamin Cowins-black male, (3) Edward Duffy-black male, (4) Paula Epstein-white female, (5) Peggy Demon-black female, (6) Armando Ferrer-white male, hispanic, (7) Scott Ingold-white male, (8) John Kemppainen-white male, (9) Dorothy O'Connor-white female, (10) Diane Otis-white female, (11) Robert Pepin-white male, (12) Willie Warren-black male.

Having narrowed the field to twelve candidates, the Screening Committee was prepared to interview the candidates. A list of general questions was prepared, although as the interviews took place, individualized and tailored questions were asked of each candidate by the Screening Committee. (R1-63-12).

Petitioner Edward Duffy was selected as one of the twelve semi-finalists to be interviewed by the Screening Committee. After the interviews were completed, each member of the Screening Committee was directed by the Chairman of the committee, Rene Garcia, to *vote for the five individuals they felt to be best qualified for the position.* (R1-60-30) (R1-63-15-17).

After the secret ballots were cast, the totals were added up by the Chairman, Rene Garcia. Plaintiff Edward Duffy received two votes (from Screening Committee members Cristina De Armas and Lucinda Woodson). At this stage, Edward Duffy was eliminated from consideration since he had received only two votes. The top five applicants were Scott Ingold (6 votes), *Armando Ferrer* (5 votes), Robert Pepin (4 votes), Benjamin Cowins (4 votes), and Willie Warren (3 votes) (R1-63-54, Plaintiff's Ex. #1). Two of the five finalists – Benjamin Cowins and Willie Warren – are black males.

The names of the five finalists for the position of Associate Dean for Academic Support were then forwarded by the Chairman of the Screening Committee to the Dean of Student Services, Dr. Castell Bryant, a black female. Pursuant to the procedures established at the college, Dr. Bryant interviewed the five finalists that had

been selected by the Screening Committee. After completing her interviews, Dr. Bryant recommended to Dr. Eduardo Padron the individual that she felt to be best qualified for the position – Armando Ferrer. (R1-56-31-34).

It would be difficult to imagine a selection process that was more fair than the process established by Miami-Dade to fill the position of Associate Dean of Academic Support. The very nature of the screening process makes it highly unlikely – if not completely impossible – that any type of discriminatory animus was behind Duffy's failure to make the final cut to 5 candidates. The screening committee could be described as both horizontally and vertically integrated. The committee was racially integrated, as well as gender integrated; it was comprised of individuals of varying job descriptions, from the clerical staff on up through the faculty and administration.

During the course of discovery, screening committee members were deposed and questioned about the basis for their decisions. Each testified that he or she applied the job specifications and qualifications to the 12 semi-finalists during their interviews and thereafter voted for the 5 best qualified candidates. In particular, Lucinda Woodson (a black female), stated that Ferrer's professional background as registrar, assistant dean of students and his work on South Campus prepared him for the

position. (R1-54-26). Robert Stevens specifically compared Ferrer and Duffy and indicated that Ferrer's experience relative to Duffy's was broader and that his perception of leadership ability was a very important factor. (R1-65-32). Carmen Borroso (a female latin clerical worker) stated that she voted for Ferrer to become a semi-finalist because he was head of the registration and administration department. (R1-65-13). Rene Garcia, the chair of the committee, stated that the committee was looking for "someone who would provide some leadership." (R1-60-29). Based upon this and similar testimony from other screening committee members, the court made a finding that it was undisputed that articulate, legitimate non-discriminatory reasons were established for the selection of Ferrer.

In this context, it must also be remembered that the 5 finalists were then personally interviewed by Dr. Castell Bryant, a black female, who was the Dean of the Wolfson Campus. In addition, it must be noted that *the screening committee had selected two black males to be in the group of 5 semi-finalists.* Neither of those black males filed suit when they were not selected to fill the position.

The Plaintiff Offered No Evidence That Miami-Dade's Reasons Were Pretextual

In response to the motion for summary judgment, which set forth extensive deposition testimony from the screening committee members, Dr. Bryant, and from Mr. Duffy himself, Duffy filed only his own self-serving affidavit and the hearsay-ridden affidavit of Venise Langlois, an ex-employee at the Wolfson Campus (who was not a member of the Screening Committee). Where an affidavit

contains hearsay, it cannot be considered on motion for summary judgment. ***See, Martin v. John W. Stone Oil Distr. Inc.,*** 819 F.2d 547, 549 (5th Cir. 1987); ***Ocean Bio-Chem v. Turner Network Tel.,*** 741 F.Supp. 1546, 1559 (S.D. Fla. 1990); ***Martin v. Ryder Distribution Resources, Inc.,*** 811 F. Supp. 658, 664 n.14 (S.D. Fla. 1992).

The District Court appropriately determined that Duffy's and Langlois' naked assertions of preferential treatment extended to latins to the detriment of blacks at Miami-Dade was "totally unsubstantiated." The court noted that both affidavits were "devoid of any facts to support a pattern and practice of preferential treatment." (R1-93-7).

REASONS FOR DENYING THE WRIT

The "decision" under review is an unpublished per curiam affirmance issued by the Eleventh Circuit Court of Appeal. As such, by definition, it can neither create conflict with any other extant decisions, nor can it be said to *address* an important issue of federal law. This Court's certiorari jurisdiction should not be exercised to "second guess" a summary judgment which has been affirmed without opinion by a Circuit Court of Appeal.

ARGUMENT

I.

WHETHER THIS COURT SHOULD EXERCISE JURISDICTION OVER AN ISSUE WHICH THE DISTRICT COURT HELD WAS NOT RAISED TIMELY, AND WHICH WAS THEREFORE NOT CONSIDERED BY THE DISTRICT COURT, PARTICULARLY WHERE THE DISTRICT COURT'S SUMMARY FINAL JUDGMENT BASED UPON OTHER GROUNDS WAS AFFIRMED BY THE ELEVENTH CIRCUIT COURT WITHOUT OPINION.

The Petitioner initially asserts that the 11th Circuit *implicitly* has decided the fundamental question of whether a new academic institution with no history of discrimination may commence and maintain an affirmative action plan. This argument is not only frivolous, it borders on bad faith.

The Appendix to the Petitioner's Writ of Certiorari before this Court confirms that the District Court order which granted Respondent's motion for summary judgment in this Title VII action *Specifically determined* that the "issue" of the affirmative action plan *had not been raised* by the pleadings, and the District Court would not allow the new, unplead argument, to be raised on the eve of trial. *See,* Footnote 2 to the District Court's Order granting summary judgment (Petitioner's Writ of Certiorari at Page a-6). There the District Court noted:

> The court construes Duffy's assertions related to the constitutionality of the affirmative action plan as *an attempt to amend the complaint on the eve of trial.* To allow Duffy to amend the complaint at this procedural juncture *would prejudice*

> *Miami-Dade by unreasonably protracting the litigation.* The court declines to do so. ***Nolan v. Douglas Co.,*** 903 F.2d 1546, 1551 (11th Cir. 1990).

(A-6) (Emphasis added).

Thus, the District court *explicitly* declined to address the merit (or lack of merit) of the Petitioner's affirmative action argument. It follows, a fortiori, that the Eleventh Circuit's per curiam affirmance of the District Court's summary judgment did not address the merits of that argument, because the argument was never properly before the District Court or the Eleventh Circuit. As such, it is improper to raise the issue here. ***See, Hennessey v. Dunlap,*** 426 U.S. 312, 96 S.Ct. 2099, 48 L.Ed.2d 660 (1976) (claim not pleaded in complaint and not considered by the District Court or court of appeals was not before the Supreme Court on certiorari).[1]

Thus, although the Petitioner presents an interesting discussion of this Court's precedent concerning affirmative action plans (Petition at Pages 13-18) that discussion is completely irrelevant, and we will not waste this Court's time with a substantive response to that argument.

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[1] By separate motion the Respondents are seeking attorneys fees and double costs as a sanction against Petitioners and their counsel for the filing of this frivolous petition.

II.

WHETHER THIS COURT SHOULD EXERCISE JURISDICTION OVER AN UNPUBLISHED PER CURIAM AFFIRMANCE OF A SUMMARY JUDGMENT IN THIS TITLE VII ACTION.

The principal purpose for which this court entertains certiorari jurisdiction is to resolve conflicts amongst Circuit Courts of Appeal and state supreme courts concerning the meaning of provisions of federal law. ***Braxton v. U.S.***, 500 U.S. 344, 111 S.Ct. 1854, 114 L.Ed.2d 385 (1991). This Court's certiorari jurisdiction is discretionary, and ordinarily will not be exercised in the absence of a lower court's opinion which *explicitly* passes upon a question of great importance related either to the Constitution or to a federal law, or where there is conflict of authority between Circuit Courts of Appeal that is "real and embarrassing." ***See, Rice v. Sioux City Memorial Park Cemetery,*** 349 U.S. 70, 75 S.Ct. 614, 99 L.Ed.2d 897 (1955).

The Petitioner appears to be arguing in his second point that the Eleventh Circuit's per curiam affirmance of the District Court's summary judgment in this Title VII action creates conflict with the numerous decisions (Petitioner's Brief at Pages 19-21) that echo the legalism that cases involving questions of motivation and intent of a particular party are *typically* poor candidates for disposition via summary judgment.

Aside from the unassailable fact that a per curiam affirmance cannot present "real and embarrassing" conflict with any other decision, we must note that the very decisions relied upon by the Petitioner do not set forth a bright line rule against the use of Rule 56 in a Title VII

action. ***See, Thornbrough v. Columbus and Greenville Railroad Co.,*** 760 F.2d 633, 640 (5th Cir. 1985) ("*often* motivation and intent can only be proved through circumstantial evidence"); ***Miller v. FDIC,*** 906 F.2d 972, 974 (4th Cir. 1990) (noting general rule that summary judgment is *seldom* appropriate in cases wherein particular states of mind are decisive elements of a claim or defense); ***Wilson v. Seiter,*** 893 F.2d 861, 866 (6th Cir. 1990) ("we are aware that state of mind is *typically* not a proper issue for resolution on a summary judgment."), vacated on other grounds, ___ U.S. ___, 111 S.Ct. 2321 (1991); ***National Union Fire Ins. Co. v. Turtur,*** 892 F.2d 199, 205 (2d Cir. 1989) ("questions of intent, we note, are *usually* inappropriate for disposition on summary judgment.").

While it is true that courts have urged caution in granting summary judgment in employment discrimination cases, the summary judgment procedure is not and never has been prohibited in this field. ***See, e.g., Mesnick v. General Electric Co.,*** 950 F.2d 816 (1st Cir. 1991); ***Summers v. State Farm Mutual Automobile Ins. Co.,*** 864 F.2d 700 (10th Cir. 1988); ***Ross v. Communication Satellite Corporation,*** 759 F.2d 355 (4th Cir. 1985), abrogated on other grounds, ***Price Waterhouse v. Hopkins,*** 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989); ***Steckl v. Motorola, Inc.,*** 703 F.2d 392 (9th Cir. 1983).

The court in ***Summers v. State Farm*** noted that "recent cases indicate that even in discrimination cases, summary judgment is not an impossibility, and that obvious cases should be weeded out before trial." 864 F.2d at 709. In ***Ross v. Communication Satellite Corp.,*** 759 F.2d 355, 365 (4th Cir. 1985), the court pointed out that summary judgment does have a role in Title VII

litigation and the fact that motive is often (if not always) an issue in employment discrimination cases does not mean that summary judgment is *never* (emphasis theirs) an appropriate vehicle for resolution of a Title VII case. The court made it clear that *unsupported allegations concerning a defendant's motive did not grant talismanic immunity from Rule 56. Id.* at 365. Otherwise, there would never be a summary judgment granted in a Title VII action.

In fact, it has been noted that one of the very purposes of the burden shifting analysis first instituted by this Court in ***McDonell Douglas Corp. v. Green,*** 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), is to "identify meritless suits and dispense with them short of trial." ***See, Foster v. Arcata Assoc., Inc.,*** 772 F.2d 1453, 1459 (9th Cir. 1985).

In short, the Petitioner's second point is as meritless and frivolous as his first point. The Respondent urges this Court to grant its separate motion for attorney's fees.

III.

WHETHER THIS COURT SHOULD EXERCISE JURISDICTION OVER AN UNPUBLISHED PER CURIAM AFFIRMANCE OF A SUMMARY JUDGMENT IN THIS TITLE VII ACTION.

Petitioner relies upon ***McLean Trucking Co. v. NLRB,*** 719 F.2d 1226 (4th Cir. 1983), which addresses the issue of "shifting justifications" in the context of a Title VII action.

However, Petitioner cites a portion of that opinion out of context, 719 F.2d at 1231, (Petitioner's Brief at Page

25), and ignores a more applicable qualifying paragraph in the opinion.

After discussing the "legalism" that shifting justifications can "*in certain circumstances*" constitute "affirmative and persuasive reasoning" for concluding that a particular justification never truly figured into the employer's actual decision, the court went on to reject that legalism in the context of the facts before it:

> Legal propositions in their abstract guise, however, should not be cited and applied indiscriminately, because, not infrequently, they fail to take into account facts rendering the legalisms inapposite. The Board committed such an indiscretion when it branded McClean's resort to Daniels' overall work record a "shifting of defenses."

Id.

Although the Eleventh Circuit's unpublished per curiam affirmance does not create conflict with any other reported decision, nor does it by definition articulate an important federal question which must be answered by this Court, we hasten to point out that the record in this case amply supports both the justifications that were relied upon *in this lawsuit*, and amply supports a reasonable explanation for why the initial EEOC response was somewhat different. First, there is no dispute about the fact that the individual who responded to the EEOC complaint on behalf of Miami-Dade had not bothered to interview a single member of the search committee. Thus, when the reasons were articulated by the members of the search committee, there was no "shifting." Their reasons were being presented for the first time.

Second, although the phrase "failed miserably" when used in the EEOC response to explain how the Petitioner had done during his interviews may have been an overstatement, it is undisputed, as the District Court noted in its order granting motion for summary judgment, that Mr. Duffy did in fact fail to make the cut from the 12 semi-finalists to the 5 finalists. And since the only basis which was utilized to pare the list down from 12 to 5 was the interview process, it follows that Mr. Duffy did in fact "fail" during the interview process. The description by the committee members of his interviews as "fine" and "OK," are not exactly indicative that Mr. Duffy was the appropriate candidate for the position.

CONCLUSION

This Court should decline to exercise jurisdiction over this matter. The Eleventh Circuit's unpublished per curiam affirmance of the District Court's order granting summary judgment is simply not a proper subject for this Court's certiorari jurisdiction.

The unpublished per curiam affirmance cannot, by definition, decide an issue of great importance to the Constitution or federal law, nor can it create any type of "real and embarrassing" conflict with any decisions of other circuit courts. Finally this Court should decline to

exercise jurisdiction because summary judgment was appropriately granted by the District Court.

Respectfully submitted,

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